

## **REMARKS**

This is in response to the Office Action, dated December 2, 2003, where the Examiner has rejected claims 1-11 and 28-37. After the present response, claims 1-11 and 28-37 are pending in the present application. Reconsideration and allowance of pending claims 1-11 and 28-37 in view of the following remarks are respectfully requested.

### **A. Examiner's Response to Applicant's Arguments**

In the Examiner's response to applicant's arguments, the Examiner states that applicant has attacked the "references individually where the rejections are based on combinations of references." Applicant respectfully submits that the above statement mischaracterizes applicant's arguments. Applicant's arguments in the previous response state that both references fail to disclose, teach or suggest the following element of claim 1: "wherein the average output rate is approximately equal to the target average data rate." Therefore, one would conclude that the combination of the two references could not show such element if neither reference discloses, teaches or suggests such element.

Furthermore, the Examiner states that "since the limitation of 'average output rate is approximately equal to the target average data rate' is vague and indefinite, a reasonably broad interpretation with combined prior art is believed being proper ...." Applicant respectfully submits that the limitation "average output rate is approximately equal to the target average data rate" is not vague and indefinite under 35 U.S.C. § 112, ¶ 2, and unless the Examiner rejects this limitation under 35 U.S.C. § 112, ¶ 2, applicant believes that the Examiner reference to "vague and indefinite" is meant to state that the limitation is interpreted broadly by the Examiner, and not that the limitation is in violation of 35 U.S.C. § 112, ¶ 2. Therefore, applicant believes that the Examiner is in agreement with applicant that this limitation is not in violation of 35 U.S.C. §

112, ¶ 2, unless the Examiner clearly states the rejection under 35 U.S.C. § 112, ¶ 2, in the next action.

**B. Rejection of Claims 1-7 under 35 U.S.C. § 103(a)**

The Examiner has rejected claims 1-7 under 35 U.S.C. § 103(a), as being unpatentable over Smolik et al. (USPN 6,501,736) in view of Bender et al. (USPN 6,002,933). Applicant respectfully disagrees.

Applicant acknowledges the Examiner's statement in the Office Action to the effect that "Smolick fails to specifically disclose the average output rate determined over a predetermined time period being approximately equal to the target average data rate." (Office Action, page 4, lines 8-10.) However, it is applicant's position that not only Smolick fails to disclose, teach or suggest such element of claim 1, Smolick does offer a scheme to reduce the effective rate that is quite inefficient and sharply different than that of claim 1. In other words, not only applicant agrees with the Examiner's above statement with respect to Smolik, but also applicant respectfully submits that Smolik's scheme teaches away from the limitation of claim 1, as explained below.

Applicant notes that Smolik's approach is quite inefficient due to using pre-determined allocation percentages for full rate and half rate frames. (See tables at col. 6.) As shown in the tables, Smolik reduces the effective rate by coding a certain percentage of frames at half rate, which were otherwise to be coded at full rate. The problem with Smolik's scheme is that it blindly reduces the number of full rate frames even if the average output rate, over a period of time, is below the target rate. For example, if background noise or silence is being transmitted at a low rate, for a period of time, the average output rate is low and more full rate frames can be transmitted, but, according to Smolik, the average output rate is completely ignored and less full

rate frames are transmitted based on the predetermined allocation percentage to reduce the effective rate. In Sharp contrast to Smolik that uses predetermined allocation percentages for reducing the effective rate, claim 1 of the present invention dynamically selects of one of the plurality of rates to ensure that average output rate is approximately equal to the target average data rate.

Now, turning to Bender, which the Examiner has relied upon to reverse and replace the teaching of Smolik, applicant respectfully submits that Bender fails to come close to disclosing, teaching or suggesting the selection of one of the plurality of rates, such that average output rate is approximately equal to the target average data rate. Bender describes an inter-system, soft handoff for operating a cellular telephone system. Bender relates to monitoring the traffic in a system, and receiving or transmitting the average rate of good frames. Bender does not disclose, teach or suggest that an average output rate is approximately equal to the target average data rate. It merely teaches averaging of good frames. Applicant respectfully submits that such teaching of Bender fails to teach or suggest to one of ordinary skill in the art to replace the approach of Smolik, which reduces the effective rate by coding a certain percentage of frames at half rate that were otherwise to be coded at full rate, based on Bender's system for monitoring the traffic in a system and receiving or transmitting the average rate of good frames, to achieve the approach of claim 1 for selection of one of the plurality of rates, such that average output rate is approximately equal to the target average data rate.

Notwithstanding the foregoing, generally speaking, many inventions are the result of inventive combinations of existing elements, and it is not sufficient for the Examiner to find various elements in various references without showing that at least one reference teaches or suggests the desirability of making the combination that the Examiner alleges to be obvious;

otherwise, the alleged combination is based on pure hindsight. Applicant would like to direct the Examiner's attention to the guidance provided by the Federal Circuit below:

"The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification" (emphasis added) (In re Gordon, 733 F.2d 900, 902 (Fed. Cir. 1984) (see also In re Fitch, 972 F.2d 1260 (Fed. Cir. 1992))).

In a proper obviousness determination, "whether the changes from the prior art are 'minor', ... the changes must be evaluated in terms of the whole invention, including whether the prior art provides any teaching or suggestion to one of ordinary skill in the art to make the changes that would produce the patentee's ... device." (citations omitted.) This includes what could be characterized as simple changes, as in *In re Gordon*, 733 F.2d 900, 902, 221 U.S.P.Q. (BNA) 1125, 1127 (Fed. Cir. 1984) (**Although a prior art device could have been turned upside down, that did not make the modification obvious unless the prior art fairly suggested the desirability of turning the device upside down**). (emphasis added) (In re Chu, 66 F.3d 292, 298 (Fed. Cir. 1995))).

Accordingly, applicant respectfully submits that claim 1, and its dependent claims 2-11 should be allowed.

**B. Rejection of Claims 8-11 and 28-37 under 35 U.S.C. § 103(a)**

The Examiner has rejected claims 8-11 and 28-37 under 35 U.S.C. § 103(a), as being unpatentable over Smolik in view of Bender, and further in view of Tiedemann et al. (USPN 5,914,950). Applicant respectfully disagrees.

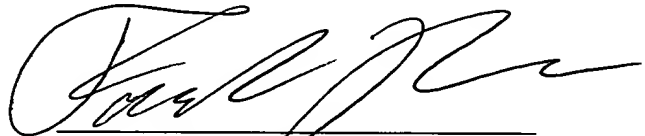
Applicant respectfully submits that claims 8-11 depend from claim 1, and for the same reasons stated above in conjunction with allowability of claim 1, claims 8-11 should also be allowed.

Further, independent method claim 28 has limitations similar to those of vocoder claim 1, and for the same reasons stated above in conjunction with allowability of claim 1, claim 28 and its dependent claims 29-37 should also be allowed.

C. Conclusion

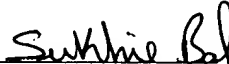

For all the foregoing reasons, an early allowance of claims 1-11 and 28-37 pending in the present application is respectfully requested. The Examiner is invited to contact the undersigned for any questions.

Respectfully Submitted;  
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